Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1993

JAMES and GLORIA SIMPSON,
Plaintiffs-Petitioners,

v.

DEPARTMENT OF REVENUE
STATE OF OREGON,
Defendant-Respondent.

Petition for Writ of Certiorari
to the Supreme Court of the State of Oregon

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is it constitutionally permissible under the principles of intergovernmental tax immunity as set forth in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), for the State of Oregon to enact a tax on public retiree benefits paid by other states, and exempt from such tax its own public retiree benefits, where the effect is a reduction in Oregon's employment costs and the simultaneous reduction in revenue collected by the federal treasury?

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Oregon appears as *Simpson v. Department of Revenue*, 318 Or. 579, 870 P.2d 824 (1994). This opinion is reproduced in the appendix hereto (A-1 to A-2). The opinion of the Oregon Tax Court appears as *Simpson v. Department of Revenue*, 12 Or. Tax 455 (1993) and is also reproduced in the appendix (A-3 to A-10).

JURISDICTION

The judgment of the Supreme Court of the State of Oregon was issued on April 7, 1994. This Court possesses jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS

This case concerns whether Or. Rev. Stat. §316.680(1)(c) violates the Doctrine of Intergovernmental Tax Immunity, whereby compensation of government employees, both state and federal, cannot be discriminatorily taxed by another sovereign, as set forth in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989) ("*Davis v. Michigan*"). During the years in question, Or. Rev. Stats. §316.048 (1989) provided:

> The entire taxable income of a resident of this state is the federal taxable income of the resident as defined in the laws of the United States, with the modifications, additions and subtractions provided in this chapter.
>
> Or. Rev. Stat. §316.680(1)(c) (1989) provided:
>
> (1) There shall be subtracted from federal taxable income:
>
> . . . .
>
> (c) Amounts received by a retiree, . . . from a pension, annuity, retirement or similar fund under a public retirement system established by the United States . . . or by this state or any municipal corporation or political subdivision of this state. . . .

In 1991 the Oregon legislature, in response to *Davis v. Michigan*, entirely removed the subtractions of Or. Rev. Stat. §316.680(1)(c) by deleting subparagraph (c).

STATEMENT OF THE CASE

Between 1950 and 1980, Petitioner James Simpson was employed by the Alaska Territorial Department of Education at Wasilla, the Ketchikan School District and the University of Alaska. As a teacher he participated in the Alaska State Teachers Retirement System (ASTRS). In 1980

Mr. Simpson retired, and he and his wife Gloria moved to Oregon and began receiving retirement distributions from ASTRS.

In March, 1989, the Supreme Court of the United States decided *Davis v. Michigan*. In that opinion, this Court held that Michigan violated the federal constitutional doctrine of intergovernmental tax immunity when it imposed an income tax upon federal retirement benefits received by Michigan citizens while it exempted from such tax State of Michigan retirement benefits received by its citizens.

After *Davis v. Michigan*, the Simpsons filed Oregon income tax refund claims, based upon footnote 4 of the Court's opinion. They contend that, by a parity of reasoning with *Davis v. Michigan*, Oregon could not constitutionally levy an income tax upon their Alaska-derived state retirement benefits while simultaneously exempting Oregon-derived state retirement benefits from Oregon state income taxation. Mr. and Mrs. Simpson sought refunds for the following years which are at issue in this case:

Tax Year	Return No.	Refund Requested
1988	F96116	$ 2,466
1989	H17932	$ 2,349
1990	253162	$ 2,703

The Oregon Department of Revenue denied all of petitioner's refund claims. The Oregon Tax Court affirmed. *Simpson v. Department of Revenue*, 12 Or. Tax 455 (1993); (A-10). The Oregon Supreme Court also affirmed. *Simpson v. Department of Revenue*, 318 Or. 579, 870 P.2d 824 (1994); (A-2).

ISSUE RAISED IN LOWER COURTS

The federal question presented for review by this Writ was raised in the Oregon Tax Court and the Oregon Supreme Court by Petitioner's written briefs and in oral argument. At the Oregon Tax Court, Plaintiff's Opening Brief, page 15, the issue is raised and footnote 4 of *Davis v. Michigan* is cited as support for Plaintiff's contention:

> Furthermore, and perhaps most importantly, Oregon's tax scheme reduces the State's employment costs at the expense of the federal treasury. This is because lower retirement benefit payments to State employees, made allowable by exempting them from State taxation, results in collection of fewer federal taxes.
>
> "We also take issue with the dissent's assertion that 'it is peculiarly inappropriate to focus solely on the treatment of state governmental employees' because '[t]he State may always compensate in pay or salary for what it assesses in

> taxes.' [citation omitted] In order to provide the same after-tax benefits to all retired state employees by means of increased salaries or benefit payments instead of a tax exemption, the State would have to increase its outlays by more than the cost of the current tax exemption, since the increased payments to retirees would result in higher federal income tax payments in some circumstances. This fact serves to illustrate the impact on the Federal Government of the State's discriminatory tax exemption for state retirees. Taxes enacted to reduce the State's employment costs at the expense of the federal treasury are the type of discriminatory legislation that the doctrine of intergovernmental tax immunity is intended to bar." [*Davis v. Michigan*, 489 U.S. at 816, n. 4.]

The Oregon Tax Court addressed the issue by stating:

> "[I]ntergovernmental tax immunity is based on the need to protect each sovereign's governments operations from undue interference by the other." Davis, 489 US at 814. Where intergovernmental tax immunity is involved, Davis held that the test is "whether the inconsistent tax treatment is directly related to, and justified by, significant differences between the two classes." Davis 489 US at 816 (quoting Phillips Co. v. Dumas School Dist., 361 US 376, 383, 4 L Ed2d 384, 80 S Ct 474 (1960)).
>
> In Davis, the individual was subject to two sovereigns. That is, the federal retiree was a resident of the State of Michigan subject to its

> sovereign powers and at the same time was subject to the sovereign power of the federal government. Under the constitutional doctrine of intergovernmental tax immunity, discriminating against federal retirees impinges on the interests of the federal government. See Davis 489 US at 817.
>
> Here, however, we are not concerned with intergovernmental tax immunity. As Oregon residents, plaintiffs are not subject to the sovereign powers of Alaska. The states are equal in their sovereign powers and deal with each other on the basis of comity. Nevada v. Hall, 440 US 410, 99 S Ct 1182, 59 L Ed2d 416 (1979). While one state cannot impose a tax or burden on another, it may impose a tax on its own residents' income received from another state. Such a tax scheme does not impinge upon the sovereign interests of the other state. Consequently, there is no intergovernmental tax immunity involved. [A-8 to A-9]

At the Oregon Supreme Court, Appellant's Brief, page 15, the same contention is made:

> Thus, the Oregon retiree may have the same after-tax benefit as the more highly compensated out-of-state retiree, but it is the federal government that "subsidizes" part of this benefit. The federal government is also discriminated against in direct violation of the intergovernmental tax immunity clause As *Davis v. Michigan* stated in footnote 4, page 816: [footnote 4 repeated here as already quoted above.]

The Oregon Supreme Court's opinion states:

> On de novo review, ORS 305.445, we agree with the conclusion of the Tax Court that taxpayers have not advanced any viable legal basis supporting their contentions. [A-2]

ARGUMENT

The federal question presented for review to this Court is important because the Oregon tax scheme deprives the federal treasury of revenue just as Michigan's discriminatory tax scheme did in *Davis v. Michigan*.

Presently seven states maintain a discriminatory scheme by exempting their own public and federal retirement benefits, but taxing all other public retirement benefits. By this discriminatory scheme these states may provide a smaller pre-tax benefit to their own retirees, but the after-tax benefit to their own retirees will be equivalent to retirees of other states, because the federal treasury collects less. These states include Arizona, Idaho, Kentucky, New York, Oklahoma, West Virginia, and Wisconsin.[1]

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[1]Az. Rev. Stat. Ann. §43-1022(2) (1993), Idaho Code §63-3022(A)(a) (1989), Ky. Rev. Stat. Ann. §141.021 (Michie/Bobbs-Merrill 1991), N. Y. Tax Law §612(c)(3) (McKinney 1987 & Supp. 1994), Okla. Stat. Ann. tit. 68

This case differs from *Davis v. Michigan* only in that Petitioner is a public retiree who worked for the state of Alaska, whereas Mr. Davis worked for the federal government. This case concerns three sovereigns: Oregon, Alaska, and the United States. Oregon's statute interferes with both the sovereign Alaska and the sovereign United States. Oregon interferes with Alaska sovereignty because Oregon discriminatorily taxes benefits which Petitioner receives from his Alaskan employment. Simultaneously, Oregon's tax scheme interferes with federal sovereignty by reducing federal revenue. By so doing, Oregon places an undue burden on the sovereign Alaska, as well as on the federal government, which is exactly what the intergovernmental tax immunity doctrine prohibits as unconstitutional. This interference with Alaskan sovereignty is substantially similar to Michigan's interference with federal sovereignty condemned in *Davis v. Michigan*, where Michigan discriminatorily taxed a federal retiree. The fact that Petitioner does not deal directly with the United States

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§2358(D)(9) (West Supp. 1994), W. Va. Code §11-21-12 (1991 & Supp. 1993), Wis. Stat. Ann. §71.05(1)(a) (West 1989 & Supp. 1993).

makes no difference. The presence of effective state interference with federal sovereignty, reducing federal revenue, fulfills the rationale for application of the doctrine of intergovernmental tax immunity. As this Court observed in *Davis v. Michigan*, individuals who suffer from discriminatory tax codes on account of their dealings with a sovereign deserve the protection of the Constitutional doctrine.

> It is true that intergovernmental tax immunity is based on the need to protect each sovereign's governmental operations from undue interference by the other. [citations omitted] But it does not follow that private entities or individuals who are subjected to discriminatory taxation on account of their dealings with a sovereign cannot themselves receive the protection of the constitutional doctrine. Indeed, all precedent is to the contrary. [*Davis v. Michigan*, 489 U.S. at 814]

As Michigan argued, and Oregon continues to argue, the rationale of these tax schemes is to lower the state's employment costs. Indeed this is accomplished, but as footnote 4 of *Davis v. Michigan* points out, it is accomplished at a cost of less revenue to the federal government. This is a violation of the intergovernmental tax immunity doctrine. The rationale is that a lower pre-tax

retirement benefit may be paid to a state's own public retirees, and those retirees will still receive an equivalent after tax benefit that an out-of-state retiree receives. This rationale is implemented by exempting a state's own public retiree's benefits from state income taxation, which allows a smaller pre-tax payment causing a smaller federal income tax payment. However, the state's own retiree will have an equivalent after-tax benefit to an out-of-state retiree, because of their own state's exemption and the smaller federal tax bite. This is illustrated, for a non-itemizing taxpayer, as follows:

A non-Oregonian public retiree receives a pre-tax retirement benefit of $22,860. Oregon taxes this amount at 9% and the federal tax applied is 28%, yielding a combined rate of 37% and after-tax benefits of $14,402. Thus, the federal treasury receives 28% of $22,860 or $6,401. Contrast the tax scheme of no state tax applied under Oregon law. An Oregon state public retiree receives a gross retirement benefit of $20,000. No state tax of 9% is applied to this amount. The federal tax rate of 28% is applied, leaving an after-tax benefit of $14,400. The federal treasury receives 28% of $20,000 or $5,600 as opposed to $6,401 in the case of the non-Oregonian public retiree.

Thus, the Oregon retiree will receive an equivalent after-tax benefit as the more highly pre-tax paid non-Oregonian retiree. The fact that the federal government "subsidizes" part of this benefit makes the rationale work. In fact, the rationale would not work at all but for this "federal subsidy." Thus, the federal government is discriminated against in direct violation of the intergovernmental tax immunity clause as *Davis v. Michigan* points out in footnote 4:

> We also take issue with the dissent's assertion that "it is peculiarly inappropriate to focus solely on the treatment of state governmental employees" because "[t]he State may always compensate in pay or salary for what it assesses in taxes." [citation omitted] In order to provide the same after-tax benefits to all retired state employees by means of increased salaries or benefit payments instead of a tax exemption, the State would have to increase its outlays by more than the cost of the current tax exemption, since the increased payments to retirees would result in higher federal income tax payments in some circumstances. This fact serves to illustrate the impact on the Federal Government of the State's discriminatory tax exemption for state retirees. Taxes enacted to reduce the State's employment costs at the expense of the federal treasury are the type of discriminatory legislation that the doctrine of intergovernmental tax immunity is intended to

bar. [*Davis v. Michigan*, 489 U.S. at 816, n. 4]

The purpose of Oregon's income tax laws, pursuant to Or. Rev. Stat. §316.680(1)(c) (1989), accomplish exactly what *Davis v. Michigan* prohibits under the intergovernmental tax immunity doctrine. Or. Rev. Stat. §316.680(1)(c) was enacted to reduce the State's employment costs, by reducing the cost of retirement benefits. As explained in *Lindau v. Department of Revenue*, 10 Or. Tax 92, 93 (1985):

> . . . [T]he legislative intent in enacting ORS 316.067 [now 316.680] was part of a benefit scheme for the governmental entities named as well as for the protection of the employe's benefits. The contention is that if the benefits are tax free, less retirement benefits need be provided to the employees.

This is the identical purpose for which the State of Michigan enacted its same tax scheme which *Davis v. Michigan* struck down. It is because Oregon's tax scheme works at the expense of the federal treasury, by simultaneously reducing the federal tax collected on its own state retiree's benefits, that a violation of the United States Constitution occurs according to *Davis v. Michigan*.

Davis v. Michigan further held that Michigan's different tax treatment of federal retirement benefits verses the state's own retirement benefits violated the constitutional intergovernmental tax immunity doctrine, because there was no significant difference between the classifications that the Michigan legislature had made. *Davis v. Michigan*, 489 U.S. at 816-817. The classifications that the Oregon legislature made discriminate in favor of Oregon public retirees and against public retirees from other sovereigns, just like those presented in *Davis v. Michigan*. This classification is impermissible because it does not explain a significant difference between the groups.

> The State's interest in adopting the discriminatory tax, no matter how substantial, is simply irrelevant to an inquiry into the nature of the two classes receiving inconsistent treatment. . . .
>
> . . . A tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits, as Michigan's statute does; rather, it would discriminate on the basis of the amount of benefits received by individual retirees. [*Davis v. Michigan*, 489 U.S. at 816-817]

Private retirees represent a significantly different class because they are subject to the Employee Retirement

Income Security Act, 29 U.S.C. §1003(b)(1), while government retirees are not. This Act provides for several limitations on private qualified retirement plans such as limits on contributions, limits on distributions, and required vesting. Furthermore the intergovernmental tax immunity doctrine, by definition, would apply only to public employees in a discriminatory tax of retirement benefits as is presented in this case.

CONCLUSION

Petitioners, James and Gloria Simpson, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Oregon.

Ridgway K. Foley, Jr.,
Of Attorneys for Petitioners

IN THE
SUPREME COURT OF THE STATE OF OREGON

JAMES and GLORIA SIMPSON,	)	
	)	
Appellants,	)	OTC 3302
	)	SC S40384
v.	)	
	)	OPINION
DEPARTMENT OF REVENUE,	)	
State of Oregon,	)	(Filed April 7,
	)	1994)
Respondent.	)	

In Banc

On appeal from the Oregon Tax Court.*

Argued and submitted March 9, 1994.

Carl N. Byers, Judge.

Thomas H. Lowrey, Lake Oswego, argued the cause and filed the brief for appellants.

Robert M. Atkinson, Assistant Attorney General, Salem, argued the cause for respondent. With him on the response were Theodore R. Kulongoski, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

PER CURIAM

The judgment of the Tax Court is affirmed.

*12 OTR 455 (1993).

PER CURIAM

Taxpayers claim that Oregon's taxation of retirement benefits paid by the State of Alaska is unconstitutional, because Oregon exempts its own public retirees' retirement benefits from income tax. Respondent Department of Revenue denied appellant's refund claims for 1985 through 1990. Taxpayers timely appealed to the Oregon Tax Court, which entered a judgment sustaining the department's opinion and order. Appellants appealed to this court. On de novo review, ORS 305.445, we agree with the conclusion of the Tax Court that taxpayers have not advanced any viable legal basis supporting their contentions. Accordingly, we affirm the judgment of the Tax Court.

The judgment of the Tax Court is affirmed.

IN THE OREGON TAX COURT

Income Tax

No. 3302

JAMES and GLORIA SIMPSON, Plaintiffs,	)	OPINION
v.	)	
DEPARTMENT OF REVENUE, State of Oregon,	)	(Filed June 16, 1993)
Defendant.	)	

Plaintiffs claim that Oregon's taxation of retirement benefits paid by the State of Alaska is unconstitutional because Oregon exempts its own retirement benefits. Defendant denied plaintiffs' refund claims for 1985 through 1990 and plaintiffs timely appealed to this court.

ISSUE

The issue before the court is whether this tax scheme violates Article I, section 32, of the Oregon Constitution, the Equal Protection Clause, intergovernmental tax immunity or the Privileges and Immunities Clause of the United States Constitution.

FACTS

Plaintiffs are husband and wife. Husband was a school teacher in Alaska for 30 years. In 1980, he retired and plaintiffs moved to Oregon. As residents of Oregon, plaintiffs included their Alaska retirement income (after recovering their basis) in their Oregon taxable income and paid taxes thereon. Plaintiffs later concluded this scheme violated both the United States Constitution and the Oregon Constitution and filed claims for refunds. There being no dispute of fact, this matter was submitted on briefs and oral argument.

STATUTORY SCHEME

During the years in question, ORS 316.048[1] provided:

> "The entire taxable income of a resident of this state is the federal taxable income of the resident as defined in the laws of the United States, with the modifications, additions and subtractions provided in this chapter."

ORS 316.680(1)(c) provided:

> "There shall be subtracted from federal taxable income:

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[1] All references to the Oregon Revised Statutes are to the 1989 Replacement Part.

> Amounts received by a retiree, or the surviving spouse of a retiree * * * from a pension, annuity, retirement or similar fund under a public retirement system established by the United States * * * or by this state or any municipal corporation or political subdivision of this state."[2]

OREGON CONSTITUTION

Article I, section 32, of the Oregon Constitution, provides:

> "No tax or duty shall be imposed without the consent of the people or their representatives in the Legislative Assembly; and all taxation shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax."

Although everyone in a classification must be treated uniformly, the legislature has wide discretion to classify for purposes of taxation. See Standard Lbr. Co. v. Pierce et al., 112 Or 314, 228 P 812 (1924). The courts will uphold such classifications if there is any rational ground or basis to do so.

> "It, however, is not sufficient to merely point out differences between the groups of taxpayers for divergent treatment. The

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[2] Although the statute contains other limitations and conditions, they are not relevant for purposes of this case.

> differences justifying the attempted classification must bear reasonable relationship to the legislative purpose."

Huckaba v. Johnson, 281 Or 23, 26, 573 P2d 305 (1978).

Although Huckaba upheld the constitutionality of ORS 316.067(3) (the predecessor to ORS 316.680), plaintiffs appear to believe that a different result must follow from Davis v. Michigan Dept. of Treasury, 489 US 803, 109 S Ct 1500, 103 L Ed2d 891 (1989), and Mathias v. Dept. of Rev., 312 Or 50, 817 P2d 272 (1991). Plaintiffs contend that a classification based solely on the source of retirement benefits cannot stand because there are no significant differences that justify such a distinction.[3]

The purpose of ORS 316.680(1)(c) is to reduce payroll costs to the State of Oregon. The state can reduce current salaries paid to its employees in exchange for exempting the same employees' retirement benefits from state income taxes; this is certainly within the legislature's power.[4] This court has previously found such purpose is a

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[3] Plaintiffs do not challenge retirement benefits received from private pension plans, recognizing that they may be substantially different.

[4] The tax exemption is part of the contract between the state and its employees. Hughes v. State of Oregon, 314 Or

"rationale [sic] predicate" for the classification. Lindau v. Dept. of Rev., 10 OTR 92, 93 (1985).

Plaintiffs misconstrue Mathias. Mathias concerned a statute that provided different values for property taxation depending upon the number of lots owned. The court held that "[t]he amount of other property that a taxpayer owns is not a rational basis for distinguishing between otherwise identical lots for tax purposes." Mathias 312 Or at 62.

No citation of authority is necessary to support the proposition that the state may exempt publicly owned property from property taxation based on its own self-interest. No qualitative differences in property are required. For example, two office buildings may be exactly alike in all respects except ownership. The office building owned and used by the state will be exempt from property taxation while the privately owned office building will be taxable. The same self-interest underlies Oregon's exempting its retirement benefits from state income taxes while taxing retirement benefits received from other states.

UNITED STATES CONSTITUTION

In Davis, the State of Michigan exempted from taxation retirement benefits paid by it but imposed its income

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1, 36, 838 P2d 1018 (1992).

tax on retirement benefits paid by the federal government. In holding such treatment unconstitutional, the Court noted that the standards for equal protection are not the standards applied to intergovernmental tax immunity. 489 US at 815-816.

Equal Protection. Under the Equal Protection Clause a discriminatory classification will be upheld "if any state of facts reasonably can be conceived that would sustain it." Allied Stores of Ohio v. Bowers, 358 US 522, 528, 79 S Ct 437, 3 L Ed2d 480 (1959). If the purpose of the classification is to reduce that state's expenses and the classification accomplishes that purpose, it is not a violation of the Equal Protection Clause.

Intergovernmental Tax Immunity.

"[I]ntergovernmental tax immunity is based on the need to protect each sovereign's governmental operations from undue interference by the other." Davis, 489 US at 814. Where intergovernmental tax immunity is involved, Davis held that the test is "whether the inconsistent tax treatment is directly related to, and justified by, "'significant differences between the two classes.'" Davis 489 US at 816 (quoting Phillips Co. v. Dumas School Dist., 361 US 376, 383, 80 S Ct 474, 4 L Ed2d 384 (1960).

In Davis, the individual was subject to two sovereigns. That is, the federal retiree was a resident of the State of Michigan subject to its sovereign powers and at the same time was subject to the sovereign power of the federal government. Under the constitutional doctrine of intergovernmental tax immunity, discriminating against federal retirees impinges on the interests of the federal government. See Davis 489 US at 817.

Here, however, we are not concerned with intergovernmental tax immunity. As Oregon residents, plaintiffs are not subject to the sovereign powers of Alaska. The states are equal in their sovereign powers and deal with each other on the basis of comity. Nevada v. Hall, 440 US 410, 99 S Ct 1182, 59 L Ed2d 416 (1979). While one state cannot impose a tax or burden on another, it may impose a tax on its own residents' income received from another state. Such a tax scheme does not impinge upon the sovereign interests of the other state. Consequently, there is no intergovernmental tax immunity involved.

Privileges and Immunities Clause. The Privileges and Immunities Clause of the federal constitution "bar[s] discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere

fact that they are citizens of other States." Toomer v. Witsell, 334 US 385, 396, 68 S Ct 1156, 92 L Ed 1460 (1948). See also Wood v. Dept. of Rev., 305 Or 23, 28, 749 P2d 1169 (1988). The Privileges and Immunities Clause does not apply in this case because plaintiffs are not residents of another state.

By moving to Oregon, plaintiffs subjected themselves to Oregon's sovereign powers and entitled themselves to participate in its political processes. In doing so, they placed themselves on equal footing with the other citizens of Oregon.

The court finds that defendant's Opinion and Order No. 92-4310, denying plaintiffs' claim for refund, must be sustained. Defendant to recover costs.

Dated this 16th day of June, 1993.

/s/ Carl N. Byers
JUDGE